76-5206

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-

HARRY ROBERTS,

Petitioner,

-v.-

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered on March 29, 1976, rehearing refused, May 14, 1976.

CITATION TO THE OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at --La.--, 331 So.2d 11 (1976), and is set out in Appendix A hereto, at pp. 1a-6a, infra.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on March 29, 1976, rehearing refused, May 14, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of first-degree murder under the law of Louisiana violates the Eighth or Fourteenth Amendments to the Constitution of the United States.

2. Whether the failure of the trial court to order pre-trial inspection of the murder weapon by the defendant violates Due Process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. Whether the use by the prosecutor of the defendant's juvenile record for impeachment of the defendant's testimony, coupled with the trial court's denial of a mandatory mistrial, constituted a violation of Equal Protection guaranteed by the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Revised Statutes Annotated and Code of Criminal Procedure of Louisiana:

> La. Rev. Stat. Ann. §14:27 (1974). "Attempt.
> A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would actually have accomplished his purpose.
> B. Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.
> C. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt.
> D. Whoever attempts to commit any crime shall be punished as follows:
> (1) If the offense so attempted is punishable by death or life imprisonment, he shall be imprisoned at hard labor for not more than twenty years. . . "
>
> La. Rev. Stat. Ann. §14:29 (1974) "Homicide; general provisions

Homicide is the killing of a human being by the act, procurement or culpable omission of another. Criminal homicide is of four grades:
(1) First degree murder
(2) Second degree murder
(3) Manslaughter
(4) Negligent homicide
No liability for criminal homicide shall attach unless the injured party dies within a year after the injury is inflicted."

La. Rev. Stat. Ann. §14:30 (1974) "First Degree Murder

First degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
(2) When the offender has a specific attempt to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;
(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.
For the purposes of paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorney's investigator.
Whoever commits the crime of first degree murder shall be punished by death."

La. Rev. Stat. Ann. §14:30.1 (1974) "Second Degree Murder

Second degree murder is the killing of a human being:
(1) When the offender has a specific intent to kill or to inflict great bodily harm; or
(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.
Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of twenty years."

La. Rev. Stat. Ann. §14:31 (1974) "Manslaughter

Manslaughter is:
(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that the average person's blood would have cooled, at the time the offense was committed; or
(2) A homicide committed, without any intent to cause death or great bodily harm.
(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or
(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1
Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years."

La. Rev. Stat. Ann. §13:1569 (1976 Supp.) "Definitions

When used in this part, unless the context otherwise, requires:
* * *
13. "Delinquent act" means an act designated a crime under the statutes or ordinances of this state, or of another state if the act occurred in another state, or under federal law. . ."

La. Rev. Stat. Ann. §13:1580 (1976 Supp.) "Decree

If the court shall find that a child is within the purview of R.S. 13:1561 through 13:1592, it may adjudge the child to be a neglected child or delinquent child as defined in La. R.S. 13:1569 or a child in need of supervision. The court in its judgment may proceed as follows:
* * *
(5) . . . No adjudication by the court upon the status of any child shall operate to impose any of the civil disabilities ordinarily resulting from conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction. . ."

La. Rev. Stat. Ann. §15:495 (1967) "Impeachment by evidence of conviction; condition precedent to proof by others; prohibition against cross-examination as to indictment or arrest

Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness, but before evidence of such former conviction can be adduced from any other source than the witness whose cridebility is to be impeached, he must have been questioned on cross-examination as to such conviction, and have failed distinctly to admit the same; and no witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein."

La. Rev. Stat. Ann. §15:567 (1967) "Conditions precedent to execution; warrant of governor

No person sentenced to death shall be executed until a

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certified copy of the indictment, verdict and sentence shall have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the warden of the Louisiana State Penitentiary at Angola, commanding the warden to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant."

La. Rev. Stat. Ann. §15:568 (1976 Supp.) "Execution of death sentence; prior confinement of offender

The director of the Department of Corrections, or a competent person selected by him, shall execute the offender in conformity with the death warrant issued in the case. Until the time of execution, the Department of Corrections shall incarcerate the offender in a manner affording maximum protection to the general public, the employees of the department, and the security of the institution."

La. Rev. Stat. Ann. §15:569 (1967) "Place for execution of death sentence; manner of execution

Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room."

La. Rev. Stat. Ann. §15:570 (1976 Supp.) "Officials and witnesses present at execution; minors excluded

Every execution of the death sentence shall take place in the presence of the warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, the coroner of the parish of West Feliciana, or his deputy, and a physician summoned by the warden of the Louisiana State Penitentiary at Angola, the operator of the electric chair who shall be a competent electrician who shall not have been previously convicted of a felony, a priest or minister of the gospel, if the convict so requests it, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under the age of eighteen years shall be allowed within said execution room during the time of execution."

La. Code of Crim. Proc. Ann. art. 598 (1976 Supp.) "Effect of verdict of lesser offense

When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial."

La. Code of Crim. Proc. Ann. art. 770 (1969) "Prejudicial remarks; basis of mistrial

Upon motion of the defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official,

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during the trial or in argument, refers directly or indirectly to:
(1) Race, religion, color or national origin, if the remark is not material and relevant and might create prejudice against the defendant in the mind of the jury;
(2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
(3) The failure of the defendant to testify in his own defense; or
(4) The refusal of the judge to direct a verdict.
An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial."

La. Code of Crim. Proc. Ann. art. 771 (1969) "Admonition

In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
(1) When the remark or comment is made by the judge, the district attorney, or a court official, and the remark is not within the scope of Article 770; or
(2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comme is within the scope of Article 770.
In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial."

La. Code of Crim. Proc. Ann. art. 803 (1969) "Same (General charge; scope); charge as to included minor offenses and plea of insanity

When a count in an indictment sets out an offense which includes other offenses of which the accused could be fou guilty under the provisions of Article 814 or 815, the court shall charge the jury as to the law applicable to each offense. . ."

La. Code of Crim. Proc. Ann. art. 809 (1969) "Judge to give jury written list of responsive verdicts

After charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The list shall be taken into the jury room for use by the jury during its deliberation."

La. Code of Crim. Proc. Ann. art. 814 (1976 Supp.) "Responsive verdicts; in particular

A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are:
1. First degree murder:
Guilty
Guilty of second degree murder
Guilty of manslaughter
Not guilty . . ."

La. Code of Crim. Proc. Ann. art. 817 (1976 Supp.) "Qualifying verdicts

Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

La. Code of Crim. Proc. Ann. art. 841 (1969) "When bill of exceptions must be reserved

Any irregularity or error in the proceedings cannot be availed of after verdict unless it is objected to at the time of its occurrence and a bill of exceptions is reserved to the adverse ruling of the court on such objection. Failure to reserve a bill of exceptions at the time of an adverse ruling operates as a waiver of the objection and as an aquiescence in the irregularity or ruling. This requirement shall not apply to:
(1) A ground for arrest of judgment under Article 859, or the court's ruling on a motion in arrest of judgment; or
(2) The court's ruling on a motion for a new trial based on the ground of bills of exceptions reserved during the trial."

La. Code of Crim. Proc. Ann. art. 844 (1969) "Formal bills of exceptions; signing; contents

A. The appellate court shall consider only formal bills of exceptions which have been signed by the trial judge in conformity with Article 845. In a case where the death sentence has been imposed, the appellate court, to promote the ends of justice, may consider bills that have not been timely signed by the trial judge.
B. A formal bill of exceptions shall contain only the evidence necessary to form a basis for the bill, and must show the circumstances and the evidence upon which the ruling was based. When the same evidence has been made part of another bill of exceptions, the evidence may be incorporated by reference to the other bill. Evidence as to guilt or innocence can only be taken down and transcribed as provided by law."

La. Code of Crim Proc. Ann. art. 920 (1976 Supp.) "Scope of appellate review

The following matters and no others shall be considered on appeal:
(1) An error designated in the assignment of errors; and,
(2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Louisiana, entered on March 29, 1976, rehearing refused, May 14, 1976, affirming petitioner's conviction and death sentence. Petitioner, Harry Roberts, a twenty-one year old black man, was sentenced to death on September 18, 1974, in the Criminal District Court for the Parish of Orleans, New Orleans, Louisiana, after being convicted of one count of first degree murder.

The State's evidence showed that on February 26, 1974, at approximately 6:20 p.m., a neighborhood argument erupted in the vicinity of 1620 Pauger Street in the city of New Orleans. A young black man identified as being the petitioner pulled a pistol and fired approximately three shots. Trial, p. 4. The subject then ran off down the street and around a corner. During the course of the disturbance, a child was allegedly injured by the gunfire. Neighbors then called the police to report the disturbance. Tr., p. 4.

A police car with two officers, Officer John Tobin and Officer Dennis McInerney, arrived on the scene around 6:40 p.m. Tr., p. 26. Persons on the scene indicated to the officers the direction in which the assailant went, and the officers pursued the subject, locating him as he turned a nearby corner. Tr., p. 27. The officers followed the subject with their emergency lights flashing up a one-way street and then around a corner to South Rampart Street. There the officers pulled the car up onto the sidewalk in front of the subject. The subject ran to the door of the car and began shooting into it. Tr., p. 29. Officer Tobin was hit in the leg and head. Officer McInerney got out of the car and was fatally injured in the face while doing so. The subject then began to run off, while Officer Tobin shot in his direction, hitting the subject in the left leg. Tr., p. 30.

Officer Tobin, with the assistance of a bystander, then

radioed for assistance. Additional officers arrived on the scene and then reported to 914 Kerlerec Street in response to a police call. Tr., p. 142. This call went out at 6:41 p.m. Tr., p. 133. Officers arriving at the Kerlerec address (which is about four blocks from the scene of the shooting) noticed a trail of blood in front of the house at 914 Kerlerec Street. Tr., p. 145. The officers followed the trail down an alleyway beside the house at 914 Kerlerec, where the alleged murder weapon was discovered. Tr., p. 156. The officers continued to follow the blood trail over two fences, to the rear of 918 Kerlerec Street, two houses down. The officers then found blood smears on the side door of the 918 Kerlerec Street residence. Tr., p. 145.

Upon entering the said residence, the officers noticed the defendant tending to an apparent leg wound. After a scuffle, the officers succeeded in taking the defendant into custody. Tr., pp. 147-48. The defendant was taken to Charity Hospital for treatment of the leg wound. While the defendant was in police custody in the emergency room at the hospital, Officer Tobin who was also there for treatment identified the defendant as being the person who fired upon him and Officer McInerney. Tr., pp. 445-46.

The defendant took the stand in his defense and testified that there was an argument at Pauger Street, and that in the course of the argument, a neighbor threatened to shoot him. Tr., pp. 287-88. He testified further that he then left the scene and began to walk to work. As he was doing so, at a point approximately two blocks from the scene of the fatal shooting, and also two blocks from the scene of the initial argument, the defendant was shot in the leg from the rear by an unknown assailant. The defendant then sought refuge in the home at 918 Kerlerec Street. Tr., p. 290. The defendant called his mother to come to get him, and also called the operator to request police assistance. Tr., pp. 294-95. Shortly afterward, the defendant testified, the officers entered the house and

arrested him, and took him to Charity Hospital.

While at the hospital, the defendant testified, the police officers rolled Officer Tobin next to him, and then they indicated to Officer Tobin that the defendant was the person who shot him. Tr., pp. 307-08.

At the trial, the murder weapon was introduced in evidence. Two fingerprints had been sucessfully lifted from the gun, which were identified as being the defendant's. Tr., p. 240, 244. The defendant testified that sample prints were forcibly taken from him during police interrogation. Tr., 310-12.

Also at trial was produced the pellet recovered from the body of the victim at the autopsy. This bullet was flattened. Tr., p. 176. The bullet had also acquired "markings" in its trave through the body of the deceased. Tr., p. 177. The State produce an expert in firearms identification who made a positive comparison between the fatal bullet and a test bullet fired from the murder weapon. Tr., p. 215. The defense was not allowed pretrial inspection of the gun or of the pellet. Trans., Vol I, p. 17 (Motion to Suppress Revolver).

In the cross-examination of the defendant, the prosecutor mentioned certain juvenile offenses committed by the defendant. Defense counsel objected to this method of impeachment, and moved for a mandatory mistrial under Article 770 of the Louisiana Code o Criminal Procedure. The motion was denied. Tr., pp. 335-36.

The defendant was found guilty of first degree murder on August 16, 1974, by a jury of eleven white men and one black man.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner's Motion in Arrest of Judgment, based on his contention that the death sentence was in violation of the United States Constitution, specifically, the Eighth and Fourteenth Amendments, Trans., Vol. I, p. 80 (September 3, 1974), was denied by the trial court, id., at p. 81. Petitioner's Bill of Exceptions No. 16 assigned this ruling as error, and petitioner briefed this issue on appeal to the Supreme Court of Louisiana, First Supplemental Brief of Appellant, State v. Roberts, La. Sup. Ct. No. 56,952, at 7. That Court rejected the claim on its merits, one Justice dissenting, --citing its decision in State v. Hill, 297 So.2d 660 (La., 1974) as being controlling. The claim was raised again in petitioner's rehearing application, Application For Rehearing and Supporting Brief, State v. Roberts, La. Sup. Ct. No. 56,952, at 2, and this application was refused without opinion, on May 14, 1976.

II. Petitioner's Motion for Oyer of the Pistol and Bullets allegedly used in the murder, Trans, Vol. I, p. 5, was denied by the trial court. Petitioner's Bill of Exceptions No. 15 assigned this ruling as error, and petitioner briefed the issue on appeal to the Supreme Court of Louisiana, First Supplemental Brief of Appellant, State v. Roberts, La. Sup. Ct. No. 56,952, at 5. That Court rejected the claim on its merits, by distinguishing the case from that of Barnard v. Henderson, 514 F.2d 744 (5th Cir., 1975). The claim was raised again in petitioner's rehearing application, Application for Rehearing and Supporting Brief, State v. Roberts, La. Sup. Ct. No. 56,952, at 1 and 7, and this application was refused without opinion, on May 14, 1976.

III. At trial, the prosecutor asked the petitioner if he had been convicted, while a juvenile, of the offenses of theft and shoplifting. Defense counsel objected to this method of impeachment as being violative of Article 770 of the Louisiana Code

of Criminal Procedure, which requires a mandatory mistrial. The motion was denied by the trial court, Trans., Vol. III, p. 336. Petitioner's Bill of Exceptions No. 13 assigned this ruling as error, and petitioner briefed the issue on appeal to the Supreme Court of Louisiana, Original Brief of Appellant, State v. Roberts, La. Sup. Ct. No. 56,952, at 9. The Court rejected the claim on its merits, reasoning that offenses committed by juveniles were not crimes, as contemplated by Article 770, and therefore a mistrial was not mandatory. The claim was raised again in petitioner's rehearing application, together with the argument that the application of Article 770 by the court constituted a violation of Equal Protection, Application for Rehearing and Supporting Brief, State v. Roberts, La. Sup. Ct. No. 56,952, at 3. The claim was denied and the application refused without opinion, on May 14, 1976.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF LOUISIANA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

While the instant application for a writ of certiorari was being prepared, the Court handed down its opinions in several cases involving the death penalty, notably Roberts v. Louisiana, --U.S.--, No. 75-5844, July 2, 1976. The cited case deals specifically with the issue of the imposition of the death penalty under the laws of Louisiana, the same issue intended by the present petitioner to be briefed here.

Petitioner therefore adopts the "Reasons for Granting the Writ" section of the petition for certiorari in Roberts v. Louisiana, No. 75-5844, and the argument therein presented.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF THE TRIAL COURT TO ORDER PRE-TRIAL INSPECTION OF THE MURDER WEAPON BY THE DEFENDANT VIOLATES DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The record below presents an important issue of general significance regarding the right of a criminal defendant to pre-trial inspection of evidence. In Louisiana, as in many criminal jurisdictions, the defendant's right to pre-trial discovery is severely limited, with a few well-defined exceptions. See, e.g., Brady v. Maryland, 373 U.S. 83 (1963); Williams v. Dutton, 400 F.2d 797 (5th Cir., 1968).

Therefore, the issue presented here is of significance to criminal jurisdictions other than Louisiana. The issue is the right of the defendant to have independent scientific tests performed on evidence prior to trial by experts retained by the defendant.

In the instant case, the prosecution had the advantage of having the alleged murder weapon subjected to ballistic tests

and also had the advantage of allowing its experts several months to examine the evidence and to draw conclusions, calling in additional experts if desired. The defendant was denied any pre-trial inspection by the trial court. The "scales of justice" were loaded as follows: The State having months to examine the evidence, and to organize the most damaging case possible; the defendant being forced to retain experts, if he can afford them, to come to court on the day of trial in hopes that the court will grant a continuance, or at least a brief recess, in order that his expert can examine the evidence in a rather hurried fashion under the watchful eyes of judge, jury and prosecutor.

A continuance to allow the defendant the time enjoyed by the State (several months) would be unthinkable. Further, the defendant does not know in advance of trial (as does the State) what the expert's findings will be. If the findings are unfavorable, the defendant may actually be placed in the position of having procured an adverse witness.

Essentially, the balance struck is the State's months of preparation, with advance knowledge of the substance of the expert testimony, versus the defendant's hurried mid-trial expert examination of a rather unpredictable outcome.

In this light, the trend of reasoning of this Court in Williams v. Florida, 399 U.S. 78 (1970) is particularly interesting. In Williams, this Court noted that the Constitution would not bar the State's request for a continuance on grounds of surprise upon introduction of alibi testimony. As well, there were no constitutional problems noticed if the State were to depose the alibi witnesses during the continuance. The Court then concluded:

> But if so utilizing a continuance is permissible under the Fifth and Fourteenth Amendments, then surely the same result may be accomplished through pre-trial discovery, as it was here, avoiding the necessity of a disrupted trial.

This reasoning leads to a similar question: if the defendant may, at trial, ask for a continuance, or at least a recess,

to examine the evidence, why may he not be allowed an examination of the evidence in advance of trial, and thereby avoid the similar disruption of the trial?

In Williams, supra, speaking of our adversary system of trial, the Court noted:

> We find ample room in that system, at least as far as "due process" is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. 399 U.S., at 82.

If indeed petitioner's trial was a "search for truth" contemplated in Williams, what was the compelling need on the part of the State to postpone defense inspection of evidence until during the trial? Why was this need so pressing that the defendant must be deprived of the right accorded the State of a thorough, unhurried examination of the evidence?

In an Louisiana case decided just prior to petitioner's trial, State v. Barnard, 287 So.2d 770 (La., 1973), the Supreme Court of Louisiana denied pre-trial inspection with the bald assertion that:

> It is the settled law of this State that an accused in a criminal case is without right to a pre-trial inspection of the evidence upon which the prosecution relies for a conviction. 287 So.2d, at 773. See also: State v. Hunter, 250 La. 295, 195 So.2d 273 (1967); State v. Shourds, 224 La. 955, 71 So.2d 340 (1954)

In Barnard, the Supreme Court of Louisiana gave no reason for the lack of the discovery requested, and rested its denial on settled caselaw. The defendant in Barnard subsequently petitioned the Fifth Circuit for relief, in the case entitled Barnard v. Henderson, 514 F.2d 744 (5th Cir., 1975). In reversing the conviction, the Court noted:

> The question is not one of discovery but rather the defendant's right to the means necessary to conduct his defense. Justice Barham of the Supreme Court of Louisiana pointed out in his dissent to the majority opinion in Barnard that "the only means by which the defendant can defend against expert testimony by the State is to offer expert testimony of his own." 287 So. 2d at 778. We agree. Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert

> of his choosing, bound by appropriate safeguards, examine a piece of critical evidence whose nature is subject to varying expert opinion. 514 F.2d, at 746.

The Louisiana Supreme Court, in petitioner's appeal, attempted to distinguish Barnard from the instant case by the observation that the petitioner did not demonstrate the necessity for pre-trial discovery. But, the petitioner asked, how can the defendant demonstrate the necessity for inspection other than by producing in court a conflicting expert opinion? And how may the defendant obtain this opinion if not through pre-trial inspection?

The circular reasoning of the Louisiana Supreme Court notwithstanding, the basic reason for denial of discovery is not discussed: this unspoken reason is assumed to be unimpeachable due to years of precedent.

The petitioner is not the only defendant to be subjected to this harsh, unreasonable rule, and the Court's consideration of this issue will affect more than only the petitioner's case. There must be somereason for the denial of pre-trial inspection of evidence: some reason more sound than the mere assertion that there is no pre-trial discovery in criminal cases.

The Court should therefore grant certiorari to consider whether the denial of pre-trial inspection of evidence constitutes a violation of Due Process.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE USE BY THE PROSECUTOR OF THE DEFENDANT'S JUVENILE RECORD FOR IMPEACHMENT, COUPLED WITH THE DENIAL OF A MANDATORY MISTRIAL, CONSTITUTED A VIOLATION OF EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

This issue is one of general significance, at least to Louisiana defendants, since it involves the question of the use of juvenile records for impeachment.

At the trial herein, the petitioner took the stand to testify in his defense. During the cross-examination of the petitioner, the prosecutor asked the petitioner if he had ever

plead guilty in juvenile court to the charges of theft and shoplifting, also mentioning in the presence of the jury the docket number and division of the juvenile case. Trial, p. 335. Defense counsel thereupon moved for a mistrial, asserting that Article 770 of the Louisiana Code of Criminal Procedure was controlling. That article provides, in pertinent part:

> Upon motion of the defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:
>
> * * *
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
>
> * * *
>
> An admonition to the jury to disregard the remark shall not be sufficient to prevent a mistrial. . . .

In accordance with the proscription of Section (2) of Article 770, La. R.S. 15:495 provides that only evidence of conviction of crime shall be used for impeachment. La. R.S. 13: 1580(5) further provides that a juvenile adjudication is not a conviction. For this reason, evidence of a juvenile record is improper for impeachment. The Louisiana Supreme Court admitted this much. State v. Roberts, 331 So.2d, at 13. However, the Louisiana Supreme Court also noted that juveniles adjudged to have committed offenses have not committed "crimes," but have committed "delinquent acts," as defined by La. R.S. 13:1569(13).

The Louisiana Supreme Court appears to have overlooked the fact that the prosecutor did not explain to the jury the legal distinction between "crimes" and "delinquent acts." The jury was presented with the words "theft" and "shoplifting", and it may be reasonable to assume, that in the absence of instructions to the contrary, they were viewed by the jury as bein crimes.

The Supreme Court of Louisiana did not adopt the arguments presented by the State on this point. The distinction between

Crimes and juvenile delinquent acts was developed by the court, and it was only in the application for rehearing that the petitioner was able to present his Equal Protection argument.

The difference in treatment among criminal defendants under the opinion of the Louisiana Supreme Court may be demonstrated as follows: Should a defendant be impeached by mention of past inadmissible crimes or allegations thereof, such as, foe example, an arrest but not a conviction of a misdemeanor, this impeachment would require a mandatory mistrial under Article 770. However, should a juvenile record be used for impeachment, as it was here, with mention of a number of crimes by name, but without mention of the fact that they are not "crimes, but rather "delinquent acts," there is no mistrial requirement, and a mere admonition would suffice. The denial to a prior juvenile offender of the protection afforded by Article 770 operates as a deniai of Equal Protection, there being no rational distinction between the prejudice caused an arrestee and that caused a juvenile offender in the situations outlined above.

It is clear that the interpretation of Article 770 by the Louisiana Supreme Court shows that the "State has accorded bedrock procedural rights to some, but not to all similarly situated." Stanley v. Illinois, 405 U.S. 645, at 658 n. 10 (1972) This Court should grant certiorari to consider this denial of Equal Protection, since the holding of the Louisiana Supreme Court affects defendants in Louisiana other than only the petitioner.

CONCLUSION

Petitioner prays that his petition for a writ of certiorari be granted.

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